No. 18705

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE APPELLEE

CHARLES A. MUECKE
United States Attorney
For the District of Arizona

JOHN E. LINDBERG
Assistant United States Attorney

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

CITATIONS

CASES

STATUTES

CONSTITUTION

AUTHORITIES

SUBJECT INDEX

No. 18705

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

I.

JURISDICTION

This case was commenced by the return of an Indictment by the Grand Jury on November 7, 1962, (RC Item 27) in ten counts charging defendant and appellant herein, Norman Nathan Semler, plus twelve other defendants, with conspiracy to steal government property and to receive government property in one count, and charging defendant and appellant herein, Norman Nathan Semler, in Counts V, VII and X with having

received various types of stolen government radios, knowing them to have been stolen (RC Item 3). (For convenience the defendant and appellant herein, Norman Nathan Semler, will be referred to as Defendant Semler, all other defendants who were on trial in this case will be referred to as Defendant followed by the surname, and all other defendants will be referred to by their surname. The transcript of the trial will be referred to as "TR", and the transcript of the record on appeal as "RC".)

The Indictment charged Defendant Semler with violating Section 371 of Title 18, and Section 641 of Title 18, of the United States Code. (RC Item 3.)

Count I charged that from on or about May 20, 1961, to on or abount June 24, 1962, Defendant Semler and twelve other defendants conspired with eight other persons named as conspirators but not as defendants along with diverse other persons to the Grand Jurors unknown to (a) steal government property over the value of $100.00, and (b) receive stolen government property over the value of $100.00. It further charged 36 overt acts in furtherance of the same. The 36 overt acts are concernedwithelevenepisodes.Thefirstepisoolv deinv act sare concerned with eleven episodes. The first episode involves the first, second and third overt acts. The second episode involves the fourth, fifth, sixth and seventh overt acts. The third episode involves the eighth and ninth acts. The fourth episode involves the tenth and eleventh overt acts. The fifth episode involves the twelfth, thirteenth, fourteenth and fifteenth overt acts, and also the substantive charges in Counts II and III. The sixth episode involves the sixteenth, seventeenth, eighteenth and nineteenth overt acts, and also the substantive charges in Counts IV and V. The seventh episode involves the twentieth, twenty-first and twenty-second overt acts, and also the sub-

stantive changes in Counts VI and VII. The eighth episode involves the twenty-third and twenty-fourth overt acts, and also the substantive charge of Count VIII. The ninth episode involves the twenty-fifth, twenty-sixth and twenty-seventh overt acts. The tenth episode involves the twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second thirty-third and thirty-fourth overt acts, and also the substantive charges in Counts IX and X. The eleventh episode involves the thirty-fifth and thirty-sixth overt acts, and also constituted the end of the conspiracy.

Count V charged Defendant Semler with having received six R-540/ARN14C radio-receivers on or about March 22, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

Count VII charged Defendant Semler with having received twenty R-540/ARN14C Radio-Receivers on or about March 27, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

Count X charged Defendant Semler with having received seven RT-263/ARC 34 Radio Receiver-transmitters and one R-540ARN/14C Radio-Receiver, on or about May 26, 1962, personal property of the United States, each of a value in excess of $100.00, all of which personal property had theretofore been stolen as Defendant Semler then and there well knew.

On November 16, 1962, Defendant Semler was arraigned. Defendant pleaded not guilty as charged in Counts I, V, VII

another airman, Sergeant Edsel Dakalb Howell, at Davis-Monthan Air Force Base (TR P 391 L 19 to P 392 L 14). Sergeant Howell asked Giavelli if he could get an ARN 21 navigational aid for a friend (TR P 393 L 19 to P 394 L 5). Giavelli arranged to have Sergeant John Milne pick one up and (TR P 395 L 1-10) Sergeant Milne does not recall how it was obtained (TR P 169 L 16-17). Giavelli and Milne drove to the Runway Bar in Tucson, Arizona, and put the set in Howell's car (TR P 396 L 10-21). Giavelli was paid $150.00 by Howell and Giavelli gave half to Milne (TR P 397 L4-21; P 173 L 23 to P 175 L 2).

Mrs. Helen Schowalter testified no ARN 21 had been sold by the 2704th Air Force Storage and Disposition Group at Davis-Monthan Air Force Base in the calendar year 1961 (TR P 471 L 7-15). Defendant Semler was on the mailing list which received the catalogs put out by the 2704th (TR P 2223 L 14-18).

(Second Episode) On or about July 17, 1961, Defendant Clark delivered eight (8) sextants and two (2) ARN 21 radios to shed at Building 4853 on Davis-Monthan Air Force Base (TR P 179-181). Exhibits 3a, b, c and d indicate U.S. Air Force planes, which were in the salvage area of Davis-Monthan at the time, had had two sextants each, but that the sextants were no longer on the aircraft and had been removed without authority by the testimony of Jack Kelley (TR P 256-258).

Mr. Charles W. Chappell, an employee of the 2704th, testified that prior to July 17, 1961, there were no records kept of any of the equipment (TR P 110 L 5-13).

Sergeant Milne and Sergeant Wooldridge transported them to a rented trailer at the Ace Hi Trailer Court on Speedway Boulevard in Tucson, Arizona, (TR P 181 L 12 to P 182 L6). Sergeant Howell looked at them (TR P 1265 L 6 to P 1266 L 4). Milne and Wooldridge borrowed a car, stopped at Defendant Clark's house and delivered them to Sergeant Howell (TR P 2506 L 5 to P 2508 L 11), who called Defendant Semler, shipped them to Defendant Semler (TR P 1266 L 5 to P 1267 L 7).

(Third Episode) On or about the 20th day of September, 1961, Sergeant Milne and Sergeant Wooldridge went with Duane Leroy Dawkins to the T-33 aircraft parked in Area 1 of the 2704th, which is near the Wilmot corner of Davis-Monthan and obtained ten (10) arn 14C (TR P 184 L 18 to P 186 L 15; P 1493 L 13-25).

Sergeant Wooldridge started stacking them in the desert outside the fence (TR P 1494 L 2-5). Wooldridge was scared by a car and they left (TR P 186 L 13 to P 187 L 10), and left the radios there (TR P 187 L 16-18; P 1494 L 6-12).

William Curtis, an employee of the 2704th, found them in the desert (TR P 475 L 24 to P 476 L 18), and performed a survey of the T-33 and found ten (10) ARN 14C radios missing (TR P 460 L 1 to P 462 L 7; P 464 L 22 to P 466 L 24; P 475 L 13-16, Exh. #5).

(Fourth Episode) On or about October 10, 1961, Sergeant Milne testified that Defendant Clark placed one ARN 21 in the truck Milne was driving (TR P 189 L 4 to P 190 L 22). Milne paid Defendant Clark $200.00 after being paid by Sergeant Howell (TR P 190 L 23-24). Charles W. Chappel testified an ARN 21 was found missing from his building where

Defendant Clark was employed over the Labor Day weekend (TR P 111 L 5 to P 112 L 7; P 126 L 9-13).

(Fifth Episode) On or about January 26, 1962, the 2704th area began the preparation of a catalog to list surplus parts for sale. Fourteen (14) ARC 33 radios were to be listed in the catalog for bid (TR P 299 L 9 to P 303 L 9, Exh. #4b). Sergeant Howell testified that Defendant Semler told him where the ARC 33's were in the disposal yard (TR P 1274 L 12 to P 1275 L 8). Howell directed Defendant Ernest Gaines to go and get them (TR P 1275 L 13-15; P 633 L 8-10). Williams, with Defendant Gaines and Defendant Walston went to the disposal yard, placed the radios on a stand (TR P 628 L 24 to P 634 L 17). Williams and Defendant Gaines returned Defendant Walston to work (TR P 635 L 10-14) and they went to town, picked up Defendant Ward (TR P 635 L 16 to P 636 L 7), returned to the stand and wheeled it across to where their car was parked (TR P 636 L 12-15) and called Sergeant Howell at 7:15 A.M. when Sergeant Howell was at work (TR P 636 L 17-19), delivered them to the desert drop area (TR P 1275 L 13-25; P 636 L 13-14), and Sergeant Howell either shipped them to Defendant Semler or Defendant Semler came and got them (TR P 1276 L 22 to P 1277 L 23; Exh. #30, Purchase Order #1739).

(Sixth Episode) On or about March 20, 1962, by the testimony of Sergeant Giavelli and Sergeant Wooldridge, Defendant Kirves went with Sergeant Giavelli and Sergeant Wooldridge into Areas 9, 10, 11 and 12 of the 2704th area where some B-47 aircraft were parked and obtained six (6) ARN 14C radios (TR P 398 L 18 to P 406 L 16; P 1464 L 18-23; P 1535 L 17 to P 1536 L 7). Sergeant Wooldrdige delivered them

to the desert area near Sergeant Howell's home (TR P 1465 L 1-5). In a couple of days, by Sergeant Wooldridge's testimony and Sergeant Howell's testimony, Sergeant Wooldridge went with Sergeant Howell, in Sergeant Howell's pickup which was loaded with the six (6) ARN 14C radios to the Sands Motor Hotel parking lot and parked the pickup and went across the street to the Desert Inn Motel (TR P 1455 L 21-25; P 1285 L 9-24). Sergeant Howell testified Defendant Semler had arranged a code by which Sergeant Howell could identify what Howell had obtained so that Defendant Semler could know what had been obtained so that he could bring the correct size of packing cartons for the radios and sextants (TR P 1272 L 25 to P 1273 L 6; P 1285 L 6-8; P 1568 L 2-25). The purpose of the code was that Semler did not want his secretary to know what was going on (TR P 1273; 1586; 1595). Defendant Semler drove to the parking lot, packed and crated the radios, and placed them in a car he was driving (TR P 1455 L 25 to P 1457 L 9; P 1285 L 24 to P 1286 L 5). Defendant Semler walked across the street, entered the lobby and went to the men's rest room and was joined there by Sergeant Howell and Sergeant Howell received $1800.00 (TR P 1457 L 11-16; P 1286 L 6-18). Sergeant Howell returned and paid Sergeant Wooldridge (TR P 1457 L 17-23; P 1286 L 18 to P 1287 L 10).

(Seventh Episode) On or about March 27, 1962, by the testimony of Sergeant Wooldridge, Pedro Leyva and Juan Ybanez, Sergeant Wooldridge got Leyva and Ybanez to help him (TR P 1463 L 12-15; P 897 L 9-14), and Defendant Kirves remove twenty (20) ARN 14C radios from the B-47 parked in Areas 9, 10, 11 and 12 of the 2704th (TR P 1454 L 16-17; P 899 L 20 to P 909 L 7; P 933 L 5 to P 936 L 17). (William Curtis testified as to a survey of these areas, 9, 10, 11

and 12, which indicated more than twenty-seven (27) ARN 14C radios missing in April, 1962 (TR P 462 L 12 to P 464 L 20). Defendant Kirves went with Sergeant Wooldridge to deliver the twenty (20) radios to Sergeant Howell in the desert (TR P 936 L 13-19; P 1453 L 17 to P 1454 L 25). A couple of days later, by the testimony of Sergeant Howell and Sergeant Wooldridge, Howell and Wooldridge went, in Howell's pickup loaded with the twenty (20) radios covered by old tires, to the Tucson Municipal Airport (TR P 1287 L 11 to P 1288 L 3; P 1487 L 14-15). Wooldridge was introduced to Defendant Semler (TR P 1486 L 11 to P 1487 L 7). They drove to the Airport Inn and Howell got in Defendant Semler's car (TR P 1283 L 3-4; P 1491 L 7-18). Howell argued with Defendant Semler about money (TR P 1283 L 4-21; P 1491 L 21 to P 1492 L 2). Defendant Semler left in a rented car with the radios (TR P 1491 L 14-16).

(Eighth Episode) On or about April 21, 1962, William Hubbs went to a cafe named Denny's across the street from where Defendant Munoz worked and met Defendant Munoz there (TR P 711 L 5-13). They made plans, and after midnight Hubbs went with Defendant Munoz to Building 5111 on Davis-Monthan where Defendant Munoz also worked and obtained seven (7) ARN 21 radios (TR P 711 L 19 to P 714 L 20) which Sergeant Wooldridge had arranged (TR P 1478 L 3 to P 1479 L 4). Four (4) radios were placed in Hubbs' car and three (3) radios were placed in Munoz's car (TR P 716 L 20-25). Munoz and Hubbs delivered them to Wooldridge in the desert (TR P 717 L 5 to P 719 L 17; P 1479 L 23 to P 1483 L 6).This date was fixed by the fact that it was Good Friday and Hubbs remembered it was the night of a party (TR P 752 L 20 to P 753 L 1).

(Ninth Episode) On or about May 9, 1962, by testi-

mony of Delevin Leon Williams, Jr. and Sergeant Louis Raymond Giavelli, Defendant Walston drove Defendant Ward, Defendant Gould, Defendant Bibbs and Defendant Parris to the Sand and Spur Bar, which is at the main entrance to Davis-Monthan Air Force Base, and met Sergeant Giavelli, who drove them to the big C-124 in the 2704th area on Yuma Road (TR P 1123 to P 1128 L 25). Defendant Ward, Defendant Gould, Defendant Bibbs and Defendant Parris went into the 2704th area and went to Building 7401, the "Million Dollar" hangar, and tried to break in. When they could not they returned to Yuma Road by the big C-124. Sergeant Giavelli had arranged for Delevin Leon Williams, Jr. to pick them up and they returned home (TR P 641 L 15 to P 645 L 5; P 1120 L 6 to P 1130 L 14).

(Tenth Episode) On or about May 25, 1962, by the testimony of Giavelli and Wooldridge, Defendant Kirves and Giavelli climbed the fence across from Building 2702, not the Chevron area, and obtained three (3) ARC 34 radios from three (3) F-86L airplanes that were parked there (TR P 410 L 13 to P 411 L 23; P 1466 L 12 to P 1467 L 12; the record of the equipment on two of these three F-86 airplanes containing the serial numbers of the ARC 34 radios was admitted into evidence, Exh. #6 and 8). While they were doing this, Wooldridge broke into Building 2702, Defendant Kirves and Giavelli joined him and they obtained one (1) ARC 34 radio and one (1) ARN 14 radio from Building 2702 (TR P 411 L 24 to P 413 L 7; P 1468 L 19 to P 1470 L 14). Sergeant Joseph F. Childers, a base police investigator, testified to the investigation on May 26, 1962, of a break-in of Building 2702 (TR P 568 L 22 to P 577 L 8). Eon C. Lucas testified to a ARC 34 radio and ARN 14 missing from Building 2702 on May 26, 1962 (TR P 553 L 2 to P 563 L 13). After the

break-in of Building 2702, Wooldridge, Giavelli and Defendant Kirves went to Building 4853 on Davis-Monthan and broke in and there they obtained three (3) ARC 34 radios (TR P 413 L 8-18; P 1470 L 15 to P 1471 L 3). One of these radios had a repair form which was left behind, and Sergeant Robert J. Volpe remembered the serial number of the ARC 34 which was found missing when he returned to Building 4853: G12477 (TR P 584 L 17 to P 588 L 2). Giavelli left them (TR P 413 L 17-18) and Wooldridge and Defendant Kirves went to deliver the seven (7) ARC 34 and the one (1) ARN 14 radios to Howell, stopping on the way to call Howell (TR P 1290 L 1-18; P 1471 L 3-6). Wooldridge recalled neither had a dime and that they used a quarter to call Howell from a pay phone (TR P 1471 L 9-12). Defendant Kirves and Wooldridge delivered the radios to Howell in the desert near Howell's home (TR P 1290 L 19 to P 1291 L 19; P 1471 L 1-19). A day or two later Sergeant Wooldridge went to Sergeant Howell who called Defendant Semler (TR P 1291 L 19- 23; P 1471 L 24 to P 1472 L 13). Two days later Wooldridge and Howell met Defendant Semler at the Tucson Municipal Airport and they went into the desert and packed them (TR P 1472 L 15 to P 1476 L 4). Defendant Semler shipped them by American Air Freight (See the twelfth bill from the bottom in Government's Exh. #32). This date is fixed by the car rental by Defendant Semler (See the Hertz Rental Agreement dated May 27, 1962 in Defendant Semler's Exh. #I). Mrs. Lucille Andre, whose husband's firm did repair work for Defendant Semler in Los Angeles, kept a work sheet of the repairs on these radios (TR P 600 L 11 to P 604 L 6; Government's Exh. #11) which had the same serial numbers as the serial number recalled by Volpe and the two serial numbers of the three taken off of the F86's. Defendant Semler had a purchase order for these seven (7) ARC 34

and one (1) ARN 14 radios (Government's Exh. #30, Purchase Order #1787).

(Eleventh Episode) On June 23, 1962, Wooldridge and Giavelli had arranged to meet at Phoenix, Arizona (TR P 1502 L 1-4). Wooldridge arranged also with Gary Duane Rowe (TR P 1502 L 4-5). All three went to Luke Air Force Base, broke into a building at that base, and obtained radios. In getting away from Luke, they were spotted (TR P 1503 L 4 to P 1505 L 13). Giavelli returned to Tucson with the radios and reported to Howell (TR P 1316 L 14-22). Howell called Defendant Semler and told him what he had (TR P 1316 L 22-23). Defendant Semler arrived in Tucson and rented a car (Government's Exh. #38), but Defendant Howell was afraid and did not meet him (TR P 1316 L 23 to P 1317 L 7). Wooldridge and Rowe were arrested (TR P 1505 L 13).

(The evidence, such as the statements and confessions of the other defendants, which was admitted only as to the respective defendants and which is not concerned in the appeal of Defendant Semler, is therefore not included in the counter-statement of facts).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The evidence was sufficient to sustain a conviction of Defendant Semler on Counts I, V, VII and X.

2. The Court properly permitted the witness Edsel Kekalb Howell to invoke the privilege of the Fifth Amendment.

3. Defendant Semler was provided with a fair trial and impartial jury.

4. There is no argument on Defendant Semler's fifth specification of error that the Court erred in failing to grant Defendant Semler's Motion to Dismiss the Indictment and the Motion to Strike and therefore the issue has not been raised.

IV.

SUMMARY OF ARGUMENT

1. The evidence was sufficient to sustain a conviction of Defendant Semler on Counts I, V, VII and X.

2. The Court properly permitted the witness, Edsel Kekalb Howell, to invoke the privilege of the Fifth Amendment for the reason that the testimony of the said Howell, who was subpoenaed as a witness by the Government, was limited, on direct examination, to the period of the conspiracy and the substantive counts as alleged in the Indictment and to the acts and charges as alleged in the Indictment, and, therefore, the question on cross-examination by Defendant Semler's counsel as to other thefts of Government property or sales of stolen Government property from 1957 to June, 1962, was not material to the issues of this case, beyond the scope of direct examination and not a proper impeaching question.

3. The Court provided Defendant Semler with a fair trial and impartial jury.

4. A mere statement that the Court erred in failing to grant Defendant Semler's Motion to Dismiss the Indictment and Motion to Strike does not raise the issue with nothing more on the record, or in the Opening Brief.

V.

ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CONVICTION OF DEFENDANT SEMLER ON COUNTS I, V, VII and X.

One of the rules on reviewing evidence on appeal is that the Appellate Court will review the evidence in the light most favorable to the prevailing party. *Souza v. United States,* (9th Cir., 1962), 304 F. 2d 274 at p. 277; *Bolen v. United States,* (9th Cir., 1962), 303 F.2d 870 at p. 874.

In Appellant's counsel's opening brief counsel cites only from Defendant Semler's testimony to indicate that Defendant Semler was not aware that the property was stolen (page 22 of opening brief citing 2221 of the transcript of the testimony, which is Defendant Semler's testimony).

This is not the rule on appeal. The rule is all the evidence presented at the trial, whether for or against Defendant Semler, should be reviewed in a light most favorable to the Government. *Souza v. United States,* supra; *Bolen v. United States,* supra. In the opening brief of Defendant Semler, there is no attempt to review all of the evidence. All that is devoted to it is one paragraph on page 22 of the brief.

The rule by which evidence in a conspiracy is considered, as was stated by the Court in its instructions (TR P 2569 L 19 to P 2571 L 13 and P 133 L 16 to P 137 L 10) is that first the jury must find that a scheme or plan existed among the persons charged as conspirators and that an act knowingly done and the statements knowingly made during the continuance of the arrangement between them and in furtherance of an object or purpose of the common plan, may be considered as evidence against all the conspirators. *Marino v. United States* (9th Cir., 1937) 91 F.2d 691.

Summarizing the evidence generally, it was to the effect that the conspiracy was ultimately organized into a breakdown of functions, the order for a type of equipment was placed, the order was passed on, a car would be supplied to transport, a second group would handle the delivery to the drop area, and some one else handled the packaging and shipping. There was even evidence that specific items would be ordered, such as the ten ARC-33, which were in a bin in the salvage yard of the 2704th (TR P 1275 L 1-6).

(The evidence of the ownership of the property and the value of the property will not be referred to. At the time of the motion for directed verdict of acquittal (TR P 2523), the evidence as to ownership and value was not questioned, much less earnestly disputed throughout the trial. It was not raised in the Motion for New Trial, nor in Appellant's Opening Brief. Therefore, Appellee will not review that portion of the evidence.)

The evidence by defendants was as follows: The oral admissions of Defendant Kirves were not controverted by Defendant Kirves, who did not take the stand before the jury

(Special Agent Bert Mereness testified to his oral statement, (TR P 1005-1008). Defendant Munoz took the stand and denied going to Base Supply, Building 5111, on the evening of April 20, 1962, and meeting Wooldridge (TR P 1704-1736, 1739-1772). Defendants Walston, Gaines and Ward took the stand and denied their written statements (TR P 1797-1828; 1828-1840; 1840-1891, respectively). Defendant Clark and his wife denied giving any equipment to Milne or Wooldridge (TR P 1962-2011; 2011-2018, respectively) and Defendant Clark denied receiving any money. He did admit receiving a radio (TR P 1976 L 18-20). Defendant Semler took the stand and denied he knew the property was stolen (TR P 2221) and Mrs. Semler testified to receiving long distance calls from Edsel Dekalb Howell at their home (TR 2419). Defendant Semler's employees testified to his kindness and generosity (TR P 2371), and to the records of Semler Industries, Inc. (TR Belle Fettman, 2368-2379; June Robinson, 2380-2413). There were character witnesses for Defendant Kirves (James E. Freytag, TR P 1641-1644; David Lundmark, TR P 1644-1647, plus list of witnesses the Government stipulated would testify to good reputation); Defendant Munoz (Leonard H. McCarthy TR P 1700-1704; Zeke Bejarano, TR P 1736-1739; Sol Anina TR 1772-1777; Delmar Michaelson, TR P 1778-1779); Defendant Clark (E. G. Huff, TR P 1897-1900; John Gemrose, TR P 1900-1912; Junior Armstrong, TR P 1912-1914; Eldon H. Young, TR P 1914-1915; John Alvin O'Brien, TR P 1940-1951; Charles Cole, TR P 1959-1961; Lionel Lopez, TR P 1961-1962) and for Defendant Semler (Jerry Senft, TR P 2025-2032; Conwell E. Keller, TR P 2138-2141 — never heard anything bad about Semler's reputation and never heard anything good; Carl Schaeffer, TR P 2141-2145; Darwin Kindred, TR P 2145-2149; Theodore Bruce Baker, TR P 2151-2153; John Simon Fluor, TR P

2170-2171; David Araan, TR P 2366-2368). A witness was called by Defendant Kirves, John McKenzie, (TR P 1649-1652) who testified Wooldridge's reputation for truth was not too good. Impeachment by all the Government witnesses was given by bringing out on cross-examination of them that John J. Milne pleaded guilty to, was convicted of a felony, and sentenced, to-wit: stealing the eight sextants and two ARN 21 units described in Overt Acts 4, 5, 6 and 7 of Count I, i.e., the second episode (TR P 207-208); that Louis Raymond Giavelli pleaded guilty to and was convicted of a felony, to-wit: stealing the seven ARC 34 and one ARN 21 described in Count IX, and Overt Acts 28 through 34 of Count I, i.e. the tenth episode (TR P 424-426); that Delevin Leon Williams, Jr. pleaded guilty to and was convicted of a felony, and placed on probation, to-wit: stealing six ARN 14C on April 23, 1962, Defendant Clark's Exhibit B in evidence (TR P 690-691); that William Hubbs, Jr. pleaded guilty to a felony and had not been sentenced, yet, to-wit: stealing seven ARN 21 units as described in Count VIII and Overt Acts 23 and 24 of Count I, i.e., the eighth episode (TR P 735); that Juan Joel Ybanez pleaded guilty to and was convicted of a felony and placed on probation, to-wit: stealing twenty ARN 14 units as described in Count VI and Overt Acts 20, 21 and 22 of Count I, i.e., the seventh episode (TR P 982); that Pedro Leyva pleaded guilty to and was convicted of a felony and placed on probation, to-wit: stealing twenty ARN 14 units as described in Count VI and Overt Acts 20, 21 and 22 of Count I; i.e., the seventh episode (TR P 1002); that Edsel Dekalb Howell pleaded guilty to Count I of the Indictment and that Counts III, V, VII and X were dismissed as to him (TR P 1337); and that Clint Roger Wooldridge pleaded guilty to and was convicted of a felony and sentenced, and paroled, to-wit: of stealing ten ARC 34 units as described in Overt

Acts 35 and 36, i.e., the eleventh episode (TR P 1588). This, then, was the evidence as submitted by the defendants to controvert the Government's case.

(It should be noted that before discussing the evidence as submitted by the Government that Defendant Duane Leroy Dawkins, who pleaded guilty to Count I, was sworn as a witness (TR P 42 and 71), but the Government did not call him to testify. Defendants Garnie Henry Gould, Winford Winston Bibbs and Richard Lee Parris pleaded guilty to Count I, but weren't called as witnesses. Gary Duane Rowe, who pleaded to the same information as Wooldridge, i.e., the eleventh episode but was not called as a witness. The Government dismissed as to Defendant Terrell Walker on January 11, 1963, before the trial commenced on January 14, 1963. Of the twenty-one conspirators named, twenty were convicted and the Government dismissed as to the twenty-first before the trial commenced.)

The testimony of the conspiracy and substantive counts was given by Louis Raymond Giavelli (TR P 387-458, 1120-1142); John James Milne (TR P 165-247, 2494-2505); Delevin Leon Williams, Jr. (TR P 619 through 697); William Hubbs, Jr. (TR P 699-791); Juan Joel Ybanez (TR P 889-922); Pedro Leyva (TR P 922-942; 983-1005); Edsel Dekalb Howell (TR P 1248-1435); and Clint Roger Wooldridge (TR P 1443-1514; 1523-1597; 2505-2514).

Giavelli and Milne testified that in May, 1961, the latter part, Giavelli was approached by Howell to obtain an ARN 21 for a friend of Howell's (TR 391-392 and TR 173-174). Howell doesn't remember if he shipped the unit to Defendant Semler or if he came and got it (TR P 1257). Wooldridge

approached Howell in May of 1961 and asked if he could get in on the situation (TR P 1445). Wooldridge had Milne obtain eight sextants and two ARN 21 units from Clark (TR P 178-179), put them in a trailer rented at the Ace Hi Trailer Court in Tucson, Arizona (TR P 181), and ultimately delivered them to the drop area in the desert by Howell's home (TR P 182, Milne; P 2507, Wooldridge). These were either shipped to Semler or he came and got them (TR P 1266 L5 to P 1267 L 7).

About this time, Sergeant Howell couldn't recall the exact time, Defendant Semler asked him to use a code when he called because Defendant Semler did not want his secretary to know what was going on (TR P 1273). Later on Defendant Semler asked Sergeant Howell not to call him at his home since he didn't want his wife to know what was going on (TR 1281 L 1-8). This was corroborated by Sergeant Wooldridge (TR P 1586; 1595). At first Sergeant Howell would bring the radios to the Sands Motel (TR P 1262 L 15-21), but later Defendant Semler became more cautious, and they would go into the desert to pack (TR P 1279 L 15-22). On the first meeting that Sergeant Wooldridge had with Semler, Sergeant Howell had to go first and explain it was all right (TR P 1485 L 19 to P 1486 L 18).

The evidence was that Defendant Semler received the six ARN 14 radios on or about March 20, 1962, at the Sands Motor Hotel parking lot by taking the radios from Sergeant Howell's pick-up, placing them in his car, and then walking across the street to the Desert Inn to pay Sergeant Howell in the men's room (TR P 1455 L 25 to P 1457 L 23; P 1285 L 24 to P 1287 L 10).

The evidence was also that on or about March 27, 1962, twenty ARN-14 radios were delivered to Defendenant Semler when Sergeant Howell, Sergeant Wooldridge and Defendant Semler went to the desert near the Airport Inn to pack the radios (TR P 1487 L 14-18; P 1287 L 11 to P 1288 L 3).

The evidence was also that on or about May 27, 1962, Defendant Semler flew into Tucson, rented a car from Hertz (Defendant Semler's Exhibit I, for only one hour, fifty minutes) went into the desert and packed the seven ARC-34 and one ARN-14 radios and shipped by American Airlines airfreight (Government's Exhibit 32, invoice numbered 01-TUS-819964) to Semler Industries, Inc. in Los Angeles.

In other words, the evidence of Defendant Semler's knowledge was direct evidence given by Sergeant Howell for all of the period of the conspiracy as well as the substantive counts, Counts V, VII, and X, and Sergeant Wooldridge testified only for the latter part of the conspiracy and all of the substantive Counts V, VII and X. The jury chose to believe the Appellee's evidence and to disbelieve Defendant Semler.

It is respectfully submitted there was sufficient evidence to find that Defendant Semler was guilty of the conspiracy as charged in Count I of the Indictment, and of receiving stolen Government property, well knowing it was stolen, with intent to convert to his own use as charged in Counts V, VII, and X.

2. THE COURT PROPERLY PERMITTED THE WITNESS, EDSEL DEKALB HOWELL, TO INVOKE THE PRIVILEGE OF THE FIFTH AMENDMENT FOR THE REASON THAT THE TESTIMONY OF THE SAID HOWELL, WHO WAS SUBPOENAED AS A WITNESS BY THE

GOVERNMENT, WAS LIMITED, ON DIRECT EXAMINATION, TO THE PERIOD OF THE CONSPIRACY AND THE SUBSTANTIVE COUNTS AS ALLEGED IN THE INDICTMENT AND TO THE ACTS AND CHARGES AS ALLEGED IN THE INDICTMENT, AND, THEREFORE, THE QUESTION ON CROSS-EXAMINATION BY DEFENDANT SEMLER'S COUNSEL WAS NOT MATERIAL TO THE ISSUES OF THIS CASE, BEYOND THE SCOPE OF DIRECT EXAMINATION AND NOT A PROPER IMPEACHING QUESTION.

Sergeant Edsel Dekalb Howell had pleaded guilty to Count I prior to the trial and Counts III, V, VII and X were dismissed to him (TR P 1337), and was subpoenaed by Appellee to testify. Sergeant Howell testified the conspiracy began in the latter part of 1960 (TR P 1250 L 25), and defendant Clark's counsel objected (TR P 1251 L 5-8). The Appellee stated the Government was offering the testimony as to Count I (TR P 1251 L 9). The Court sustained the objection (TR P 1251 L 15-16). The rest of Sergeant Howell's testimony was concerned with the period May 20, 1961 to August, 1962, when he called Defendant Semler from South Carolina (TR 1315 L 1-18). The only divergence from this period was when, on direct examination, he stated he called Defendant Semler in May, 1961 to sell him some radios and then had to call him back after he obtained the descriptions (TR P 1255 L 9 to 1256 L 25), and then Sergeant Howell was asked how long he had known Defendant Semler and Sergeant Howell replied:

"A. I had known Mr. Semler since I had worked for him in '57, I believe it was.

"Q. Were you working for him in this period in 1961?

"A. No sir." (TR P 1257 L 13-16)

Based on this question, Defendant Semler's counsel asked as follows on cross:

"Q. (By Mr. Chandler) Now I believe you said that you left the Semler employment in '57 and your next dealings with him was in late '60, as I recall. Is that correct?

"A. That could be correct, sir. I'm not positive of the date.

"Q. As a matter of fact, Mr. Semler wrote you also from time to time, didn't he, Mr. Howell?

"MR. MUECKE: Your honor, I object. No proper foundation as to what period of time we are talking about that would make the question relevant.

"THE COURT: What period do you have in mind, Mr. Chandler?

MR. CHANDLER: May we approach the bench briefly?

"THE COURT: I think as far as this is concerned, if you will just state the period.

"MR. CHANDLER: I have in mind the period that was discussed on direct examination. That is no contact between '57 and '60.

"THE COURT: The objection is overruled, limited to that. During this period of time that you said you had no contact with Mr. Semler, that when you left his employment until late 1960, he wrote you letters, didn't he Mr. Howell?

"THE WITNESS: I don't remember ever receiving any letters, sir, *at that time.*" (TR P 1355 L 10 through P 1356 L 8, emphasis supplied).

(TR P 1355 L 10 through P 1356 L 8, emphasis supplied).

Then skilfully a few questions later at page 1359 of the transcript at line 13, Defendant Semler's counsel asks as follows and the Court rules:

"Q. Now, in connection with your relationship with Mr. Semler, you were doing business with him, were you not—

"MR. MUECKE: Your honor, I object. Not proper foundation. I don't know what period we are talking about, doing business.

"MR. CHANDLER: I don't want to ignore the ruling of the Court about the period of time, but I assume that I'm at liberty to inquire into some matters that he testified to on direct during the period of '57 to '60, and I have reference to the fact he had no dealings or relationship with Semler during that period.

"THE COURT: He may answer as to that period, but the question does not indicate in what period you mean.

'Q. (By Mr. Chandler) All right, I rephrase the question.

"M. MUECKE: Your honor, for the record, may I make a further objection? I do not recall that on direct the witness stated that he had no dealings. I recall that I attempted to go into the matter. Defense counsel made an objection to my going into it and I was foreclosed from going into this whole period, area, or what he did.

"THE COURT: It is my recollection that—and I could be wrong—but it is my recollection that he testified to having been employed by a Mr. Semler or one of Mr. Semler's firms in 1956 or 1957, and he then said he had no contact with him

until 1960. That's my recollection of it, and it is on that recollection of it that I will permit counsel to ask about it.

"MR. MUECKE: May I say this, your Honor, that I believe my question that elicited—perhaps we ought to look at the record—but my question when I was foreclosed from going into it was in 1960 or '61, what contacts did you have with Mr. Semler. In other words, I had to skip the period, because there was an objection made to going into anything prior to that period. And I just want to make the record on that, your honor.

"THE COURT: You may proceed." (TR P 1359 L 13 through P 1360 L 25).

And the door was opened to impeach Sergeant Howell on this period 1957 through 1960. Sergeant Howell testified he did not recall receiving mail, but he was not denying it. But this entire line of questioning was beyond the scope of direct, and the "II" series of exhibits of Defendant Semler are marked and Sergeant Howell was questioned about them (TR P 1361 L 14 to 1383 L 3).

Then, at Page 1386, Line 12, Defendant Semler's counsel asked Sergeant Howell if he sold to other than Semler and Sergeant asked if he could refuse to answer (TR P 1386 L 17) and the Court asked to hear the question again (TR P 1387 L 15-16) and the Court instructed the witness as to his rights (TR P 1387 L 17 to P 1388 L 11). At Page 1410 of the transcript of the testimony the Court restated the question, then Sergeant Howell invoked the Fifth Amendment, and the Court sustained the privilege. At a conference at the bench out of the hearing of the jury Defendant Semler's counsel enlarged the question for the record (TR P 1411 L 1-25) and

the Court indicated it would sustain the claim of privilege (TR P 1412 L 21-22).

In Defendant Semler's Opening Brief, he does not cite one case that meets the issue raised here (P 25-28).

The first case cited is *Rogers v. United States* (1951) 340 U.S. 367, which affirmed 179 F.2d 559. In this case Rogers had been subpoenaed to testify before a Federal grand jury in Denver, Colorado. In answer to questions put by the grand jury, Rogers stated she had been Treasurer of the Communist Party in Denver, had had possession of its records, and had turned the records over to another party. Rogers refused to identfy to whom she had turned the records over on the grounds she didn't want to harm anyone. She was committed to the custody of the United States Marshal and advised of her right to counsel. The next day Rogers was brought back into Court and then claimed the privilege of the Fifth. The Court held that she had disclosed the fact that would tend to incriminate her, she could not refuse to give the details. Further, books kept in a representative capacity cannot be the subject of a claim of the privilege. The distinction between this (Rogers) question and the question asked Howell is obvious.

In *Brown v. United States* (1958) 356 U.S. 148, affirming 234 F.2d 140, Brown was summarily held in criminal contempt. The issue arose in a suit for denaturalization of Brown for fraudulently procuring citizenship in 1946 by falsely swearing she had not been a member of the Communist Party or an affiliate organization. The Government, in its case in chief, called her (Brown) as a witness. The Government asked question unlimited in time or directed to the period after 1946. Brown invoked the privilege of the Fifth, and the Court sus-

tained the privilege. However, Brown then took the stand in her own behalf and stated that she had never taught or advocated the overthrow of the Government, or that she belonged to any organization which so advocated, that she would take up arms to fight Russia and that she believed in the Constitution. On cross-examination by the Government, she was asked: "Are you now or have you ever been a member of the Communist Party?" Brown invoked the Fifth. The Government also asked numerous questions concerning her activities since 1946, and Brown again invoked the Fifth. The Court directed her to answer. Brown refused and the Court held her in contempt. The Court held at Page 153:

> "He who offers himself as a witness is not freed from the duty to testify. The Court *(except insofar as it is constitutionally limited),* not a voluntary witness, defines the testimonial duty. See Judge Learned Hand in *United States v. Appel,* 211 F. 495." (Emphasis supplied)

The distinction here is obvious. Sergeant Howell was not a voluntary witness. He did not choose the area of disclosure. The Government (Appellee herein) did that and it was limited to the period of the conspiracy as charged in Count I (which included the period of the substantive counts) of the Indictment and to the conspiracy charged therein. Sergeant Howell was not a party, as in the Brown case, as the Court stated at page 155:

> "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry."

The ruling in the Brown case was not that the mere taking of the stand waived the privilege, but that her direct testimony opened the field of inquiry.

The next and last case cited on this point is *United States v. St. Pierre* (2nd Cir., 1942) 132 F2d. 837. (Certiorari was dismissed, *319 U.S. 41,* since the case was then moot, defendant having served his term). St. Pierre was convicted of criminal contempt in refusing to answer questions put to him by a Federal grand jury. St. Pierre testified he had embezzled, and carried the proceeds across state lines. He then was asked to whom proceeds were delivered and he invoked the Fifth. Judge Hand stated at page 840:

> "Cases may perhaps arise where the testimony put forward as a waiver was so vague or general as to raise a question whether specifications can be said to be truly in amplification of it, but no such embarrassment exists here."

As was submitted before, Sergeant Howell did not open any other area on direct except the conspiracy charged in Count I. On direct, Sergeant Howell was asked:

"Q. All right. Any other persons who have been involved in any of these episodes that you have not mentioned?

"A. I didn't get that.

"Q. Any other persons you have not mentioned in your testimony today that were involved in any of these that you know about? You testified to the taking of these various sets and all the various transactions. Are there any persons you have not mentioned that were involved in these, that were involved that you have not mentioned here?

"A. Not that I know of, sir.

"Q. Did any of these defendants here tell you about any other person you can recall?

"MR. MORGAN: I object, asked and answered, the terms were broad on the question which he asked first.

"THE COURT: He may answer.

"MR. MORGAN: If he remembers.

"THE COURT: If he remembers.

"MR. MUECKE: If you remember.

"A. Yes, sir, since I saw this fellow over here sitting on the end, I found out later his name is Mr. Clark. Sergeant Wooldridge said he is the guy you got some stuff off of. Whether he did or not I don't know."

(TR P 1299 L 24 through P1300 L 20).

In Defendant Semler's Motion for New Trial (RC Item 17) Defendant Semler contended that the second to last question asked Sergeant Howell above, starting on line 2 of page 1300 of the transcript of testimony did open the area, but when read in context as set out above the reference was clearly to these episodes.

The materiality or relevancy of the question in issue is not apparent. Prior bad acts of a witness, and which are not felony convictions, who is not on trial, cannot be shown. *Wigmore on Evidence,* McNaughton Revised 1961. §2268:

> ". . . For example, in the impeachment of a witness by cross-examination to character he may be asked whether he stole from his last employer, and this fact might for that purpose be held inadmissible (§982-987 supra), though, even if it were admissible to be asked, it might still be privileged from answer."

Prior bad acts of a defendant on trial may be shown as evidence of intent. Prior bad acts cannot be used to impeach a witness, unless, of course, it is a conviction of a felony. No such conviction of sales to others by Sergeant Howell was shown. If it

were asked as a foundation question for an impeaching witness, where is the offer of proof by Defendant Semler?

In *United States v. Cardillo,* (2nd Cir., 1963) 316 F.2d 606 at p. 611, it is stated:

> "However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States v. Kravitz,* 3 Cir. 1960), 281 F.2d 581; *Hamer v. United States,* (9 Cir. 1958), 259 F.2d 274; *United States v. Toner,* (3 Cir. 1949), 173 F.2d 140."

It is respectfully submitted that the Court properly sustained the invoking of the privilege of the Fifth Amendment by Edsel Dekalb Howell on question submitted on cross-examination which could incriminate him and which was on a subject not gone into on direct testimony and was not material or relevant to the issues in that a prior bad act of a witness, not a party, cannot be used to impeach the witness.

3. THE COURT PROVIDED DEFENDANT SEMLER WITH A FAIR TRIAL AND IMPARTIAL JURY.

Defendant Semler made a motion for severance (RC Item 9) on which oral arguments were heard on December 10, 1962, and were denied (RC Item 10). In Defendant Semler's motion for severance (RC Item 9) Defendant Semler contended there was no relation between the substantive counts and the conspiracy count.

As was stated in the argument on the motion and Counter Statement of Facts herein, the entire Indictment was concerned with eleven episodes, the overt acts of Count I were set off by semicolon and then a period to indicate the end of an episode and the substantive counts were involved in these same episodes, i.e., Count V with the sixth episode with which Overt Acts 16, 17, 18 and 19 of Count I were involved; Count VII with the seventh episode with which Overt Acts 20, 21 and 22 of Count I were involved; Count X with the tenth episode with which Overt Acts 28, 29, 30, 31, 32, 33 and 34 of Count I were involved. In Defendant Semler's motion for severance (RC Item 9) Defendant Semler contended there was no relation between the substantive counts and the conspiracy count. In *Williamson v. United States,* (9th Cir., 1962) 310 F.2d 192 at p 197, it was held that:

> "The motion was properly denied. A general unsupported assertion of prejudice was not enough to justify the severance of counts properly joined."

This motion for severance was not renewed in Chambers before the trial commenced (RC Item 13) and was *not* renewed at the close of the Government's case (TR P 1624 L21 to P 1634 L 20), and was not renewed at the close of all the evidence (TR P 2523 L 17-24), nor in the Motion for New Trial (RC Item 17). If Defendant Semler is now contending that an alleged prejudice became apparent at the time of trial,

it is respectfully submitted that he has waived it. *Williamson v. United States,* (9th Cir., 1962), supra, at p. 197 and the cases cited in footnote 18 thereon.

In Defendant Semler's (Appellant's) Opening Brief, he cites and quotes (Appellant's Opening Brief P 29) Judge Learned Hand in *Nash v. United States,* (2nd Cir., 1932) 54 F.2d 1006, which affirmed the conviction of the lower court and found no prejudice in the joinder of the trial.

Krulewitch v. United States (1949), 336 U. S. 440, is cited for an alleged ruling at page 445 (Appellant's Opening Brief P 29). It is respectfully submitted that was not the ruling. The Supreme Court reversed a conviction, 167 F.2d 943, because the trial court admitted a complaining witness's statement to a co-conspirator made a month and one-half after the conspiracy ended and that co-conspirator was not on trial.

In *United States v. Standard Oil Co.,* (W D Wis. 1938), 23 F.Supp. 937, the trial court directed a verdict of acquittal as to a certain defendant after the jury returned a verdict of guilty as to that defendant. (This case involved the trial of forty-six defendants, and not seven as in this case on appeal).

But as was submitted before, the motion for severance has been waived.

Defendant Semler then stated in his opening brief that there was prejudicial publicity prior to trial and discusses the case of *State v. Taborsky,* (Conn. 1960) 147 Conn. 194, 158 A.2d 239, affirming 20 Conn. Supp. 242, 131 A.2d 337, in which the Connecticut Appellate Court distinguished the case from *Shepard v. Florida,* (1951), 341 U.S. 50. In the Shepard

case 46 So.2d 880 was reversed because jurors admitted reading and knowing the contents of articles which stated confessions were obtained but never introduced in trial. The opening brief then cites articles in the appendix (Opening Brief P 31, footnote 12) which are not a part of the record and which Appellee is moving to strike. He next discusses an article dated July 3, 1962, that is not in the record nor in the appendix which Appellee is also moving to strike.

On Page 33 of the Opening Brief, *Crawford v. United States* (1909), 212 U.S. 183 at p. 196, is cited and a quotation thereof taken out of context. In Crawford the defendant had challenged a juror for cause since the juror was a Government employee and the Court overruled the challenge. The quotation given on page 33 leaves out at the asterisks the prejudice of the juror on account of his relations to one of the parties.

Then *United States v. Accardo* (7th Cir., 1962) 298 F.2d 133 is cited at page 33 of the Opening Brief. In this case the Seventh Circuit reversed the trial court on three grounds, one of which was the jury should have been questioned individually and not generally.

In this case the Court questioned the jurors individually who had read or heard of the case and none of them had an opinion. Mrs. Collier (TR P 19 L 5 to P 20 L 19), who read an article the day before who could not recall the article with any clarity but just that the trial was "coming up today" (TR P 20 L 24); Mr. Watwood (TR P 20 L 20 to P 21 L 21); who read an article Friday or Saturday (TR P 20 L 25 to P 21 L 1), who could recall the details (TR P 21 L 2-6). These two were selected as jurors—TR P 47); Mrs. LaMoine (TR P 21 L 21 to P 22 to L20) saw an article in December, and saw it was in Federal Court and so did not read it and so "got

out of that quick" (TR P 22 L 8-10); Mrs. Coppola (TR P22 L 21 to P 23 L 20) who had seen something on the TV late news about three months ago but it was just something about Davis-Monthan and boys had done something. "I didn't —I don't remember the facts" (TR P 23 L 3-5); Mr. Doran (TR P 23 L 20 to P 24 L 12) who had read the original article and "heard several TV accounts since and it—just the fact the charge has been made, and I don't have any opinion as a result of that (TR P 23 L 21-24); Mrs. Perez (TR P 24 L 13 to P 25 L 6), who had scanned the article the day before who did recall the details of that article (TR P 24 L 18-20). No challenge for cause was made of these six jurors (see TR P 19 through 25), and Miss Seaney (TR P 35 L 1-6), who had read the article the day before the case was coming up and not the facts of the case. No challenge for cause was made at any time by any of the defendants of those jurors (see TR P 3 through P 64), except Defendant Semler's attorney renewed the motion for continuance and for change of venue made in Chambers (TR P 64 L 18-21, referring to RC Item 13).

In *Marshall v. United States,* (1959) 360 U.S. 310 (cited at page 34 of the Opening Brief) a conviction was reversed where three jurors read an article that appeared during the trial and the article referred to previous conviction of the defendant, who did not take the stand.

There is no evidence in the record herein or any indication at all that any of the jurors read or heard any accounts of the trial during the trial.

The quote of Judge Frank on page 34 of the Opening Brief is from the dissenting opinion in *Leviton v. United States,*

(2nd Cir., 1951) 193 F.2d 848, cert. denied, 343 U.S. 946, in which there was evidence on the record that in the jury room was found an edition of the New York Times containing an article concerning the matter, but which stated the trial involved $9,500 of barbed wire and a $200 attempted bribe, and the trial actually involved wheat flour and lard and evidence that the defendant had bought $40 worth of clothing for the witness. The Second Circuit held that unless courts accept the hypothesis that cautionary instructions are effective, criminal trials in large metropolitan areas may be impossible.

In *United States v. Ogden.* (Penn. D. 1900) 105 Fed. 371, cited on page 34 of the Opening Brief, the trial court granted a new trial on a verdict of guilty, when some of the jurors admitted reading an article which appeared during the trial because the jurors could not be permitted to say it influenced them because they cannot impeach their own verdict. Again, it is submitted that there was nothing to indicate the jurors read or heard any accounts of the trial during the trail.

In *Briggs v. United States,* (6th Cir., 1955) 221 F.2d 636, cited at page 34 of the Opening Brief, the Sixth Circuit reversed, because, although the instructions were not included in the record, the Government made no claim there was a cautionary instruction not to be influenced by anything other than the evidence.

On January 14, 1963, before the trial jurors were selected, the Court cautioned the twenty jurors and the other jurors at the noon recess (TR P 45 L 6 to P 46 L 4), not to read newspapers, don't listen to any radio or watch any television and don't discuss the case. Before the first afternoon recess on the first day, January 14, 1963, after the twelve jurors were

selected (TR P 47) and the two alternates (TR P 64), the Court gave a clear and cautionary instruction not to discuss the case, not to read newspaper articles, or listen to radio or television, to keep themselves segregated, not to socialize with anybody other than jurors, so that they do not inadvertently speak to a witness or any interested party. (TR P 65 L 20 to P 68 L12). He even cautioned them to bear this in mind throughout the trial whether he referred to these things again or not (TR P 68 L 10-12). And he did throughout the trial. On February 6, 1963, when the trial recessed and there were only three surrebuttal witnesses left for the next day, the Court cautioned them not to make up their minds until all the evidence was in and had had the benefit of argument and had received the Court's instruction as to the law as well as stating not to read articles, etc. (TR P 2521 L 25 to P 2522 L 13).

In *Irvin v. Dowd*, (1961) 366 U.S. 717, the Supreme Court reversed the Indiana Supreme Court which refused to reverse a conviction on the basis of an Indiana statute providing for only one change of venue. Defendant moved for change of venue and was granted it. In the new court a panel of 430 was called, 268 were excused for cause on fixed opinions, and eight out of twelve who were ultimately picked admitted having fixed opinions on voir dire. The United States Supreme Court ruled the Indiana Supreme Court could have granted a new trial and a change of venue, and stated at page 722:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the

> mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois,* 123 U. S. 131; *Holt v. United States,* 218 U.S. 245; *Reynolds v. United States,* supra."

But here none of the jurors expressed any opinion on voir dire (TR P 3 to P 64).

In *Coppedge v. United States,* (D.C. Cir., 1959) 272 F.2d 504, the conviction was reversed because the Court had not admonished the jurors not to read the newspaper or listen to broadcasts. The Court recessed on Thursday and reconvened on Monday. Various prejudicial matters were published in the papers. The defense attorney produced the articles on Monday and asked for a mistrial. *Counsel then asked the Court to inquire of the jurors if they had read the articles. Some had.* Court instructed that articles must not affect decision and asked, Was there anyone who would be? None raised his hand. The Court repeated the question. The Circuit Court held the trial court should have admonished the jurors on the first recess, nor did the Court warn the jurors who had read the articles not to reveal the contents. By the nature of the articles there was no necessity of showing he was injured. (Articles carried the account of a witness who refused to answer when first called and was afraid to testify because the defendant was serving time for assaulting the witnesses's brother. The Court held the witness in contempt and suspended the sentence. The defendant did not take the stand.)

In *Holmes v. United States,* (4th Cir., 1960) 284 F.2d 716, cited at page 36 of the Opening Brief, the conviction was

reversed because even after careful instructions one of the jurors communicated with a Deputy United States Marshal. (The juror's version was that he said, "I wonder where the defendants are staying?" and the Deputy Marshal replied that he didn't know where Holmes was staying but Bedani was serving a six year prison sentence. The Deputy Marshal's version was, he don't know about Holmes, but he took Bedani back and forth to Lexington County Jail, and that the juror learned of the conviction from a newspaper article). The Fourth Circuit reversed the conviction for the improper communication between a court official and a juror. *Holmes v. United States,* supra, at p. 719.

In *New York v. Bloeth*, (2nd Cir., 1963), 313 F.2d 364, cited on page 36 of the Opening Brief, the Second Circuit reversed a state conviction since the standards of impartiality as set forth in *Irvin v. Dodd,* supra, were not met. The Court held that too many of the panel had opinions, and that there was not a sufficient voir dire of those who did have opinions to see if they could be set aside. (Of 16 jurors seated, only one had not read of the case—eight had no opinion, eight did have an opinion as to guilt but could be changed. Of jurors called other than the sixteen, forty-two were excused who had fixed opinions, thirty-four had opinion as to guilt, five had no opinions and two had not read of the case.)

As was stated before, of the twenty-eight jurors called, none had an opinion. If Defendant Semlar claims that the nine jurors, who had stated they had read something of the matter and had no recollection other than there was a charge and had no opinion, were prejudiced then it is respectfully submitted there should have been a challenge for cause as was done in *Crawford v. United States,* supra, wherein a juror stated he was an employee of the Government, but this fact

would not influence his opinion and the defense attorney did challenge for cause and was overruled by the trial court.

Defendant Semler next argues the mass trial was unconstitutional and cites *Kotteakos v. United States,* (1946) 328 U.S. 750 at page 37 of the Opening Brief in support of this. In that case thirty-two were indicted, nineteen of which were brought to trial, thirteen of which were submitted to the jury. In that trial eight separate conspiracies were shown, but the Indictment charged only one. In the quote given on page 37, no page is given for the quotation, but it is respectfully submitted that the first part is a sentence taken from the middle of a paragraph on the top of page 774, and the last half is a portion of a sentence from the last paragraph on the bottom of page 775. The full sentence on page 775 reads:

> "That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record."

Defendant Semler then makes the bare assertion that there was no connection between the eleven episodes and Defendant Semler, and ignores the transcript of the testimony, "as shown by this record" completely.

The testimony of Sergeant Wooldridge is ignored, to cite a few illustrations:

> "A. We loaded the units in the truck, he had a GMC truck and we took them to the parking lot at the Sands Motel and just parked the truck in where the bed was back to us. We went over across the street to the Desert Inn Motel and sat down at a bar, and this is the first time that I actually knew Mr. Semler's name or what he actually looked like. And while we were sitting in the

bar I never did see Mr. Semler drive up, but I could see him unloading the units from the truck and putting them in the car.

"Q. Could you see his face?

"A. I couldn't see his face close enough to say, well, this is, you know.

"Q. Well, how did you know—

"A. His features—

"Q. You said it's Mr. Semler, how did you know that?

"A. Well, Dixie told me that this—this is when he told me that this is who he sells the radios to, this is the boss man or what have you."
(TR P 1455 L 21 through P 1456 L 13),

and then on P 1485 L 19 to P 1486 L 9, where Sergeant Howell had to have five minutes to explain to Defendant Semler that Sergeant Wooldridge was "okay" and "it would be all right" to meet him.

And the testimony of Sergeant Howell, to give a few illustrations of the conversation in the Sands Motel room in June of 1961 of Defendant Semler where the Defendant Semler orders radios (TR P 1263 L 2-12), of the Defendant Semler sending him a booklet with items checked in it (TR P 1274 L 3-11), of ordering specific radios which had been placed for bid on the market (the ARC-33) giving Sergeant Howell the specific location (TR P 1274 L 15 to P 1275 L 8), of asking Sergeant Howell to use a code, suitcases, (TR P 1272 L 25 to P 1273 L 18), of not to call him, Defendant Semler, at home any more (TR P 1281 L 1-5), and so on.

All this evidence is ignored by Defendant Semler and the bare assertion is again made of his lack of knowledge of the thefts.

The evidence was either direct or circumstantial, but it is submitted that the rule on appeal is to review the evidence in the light most favorable to the prevailing party. (*Souza v. United States,* supra; *Bolen v. United States,* supra)

Next, Defendant Semler alleges in the Opening Brief at page 38, the Court should not have given the instruction when the first evidence was submitted on the conspiracy count, Count I. Since no citation to the record is given in the Opening Brief, it will have to be assumed that Defendant Semler has reference to pages 133 to 137 of the transcript of the testimony, wherein the Court instructs the jury as to how the evidence will be considered. No objection was taken to this (see page 137 and thereafter of TR). It cannot be raised for the first time on appeal. (*United States v. Socony-Vaccuum Oil Co.,* (1940) 310 U.S. 150 at pages 238-239, which rules on no objections on the arguments of counsel, but is the rule generally on any claimed error not objected to.)

The instructions were circulated to the Government and defense counsel (TR P 2528 L 2-3). When they were is not shown by the record, but it appears from the Opening Brief that Defendant Semler is now claiming his counsel did not have sufficient time to review the Court's instruction (Opening Brief, page 38) to object effectively, or else Defendant Semler is arguing there was no settlement of instruction and ignores the record of what occurred the afternoon of February 6, 1963, in Chambers when, first the usual motions were asked for by the Court at that time with only three witnesses left

and no objection was made by counsel (TR P 2523 L 1-16), and then the usual motions were made (TR P 2523 L 17 to P 2526 L 7). Then the forms of verdicts were settled (TR P 2526 L 8 to P 2527 L 1). Then the Court took up first the Court's instructions and permitted objections and exceptions for the record (TR P 2527 L 2 to P 2531 L 7); then the Government's proposed instructions were taken up (TR P 2531 L 7-22); then each defendant's proposed instructions (TR P 2531 L 23 to P 2546 L 6). It is respectfully submitted that the practice in the Tucson Division of the United States District Court for the District of Arizona is to make the record of objections and exceptions as was done in this case in Chambers and not after the charge.

The objection to the conspiracy instruction (Court's One, RC Item 16), as stated by Defendant Semler's counsel, was to incorporate Defendant Munoz's objection to the conspiracy instruction (TR P 2527 L 25 to P 2528 L 1), which was that in instructing as to the law of conspiracy on overt acts Defendant Munoz's counsel contended that in stating that the act could be as innocent as a man walking across the street or driving an automobile or using a telephone constituted a comment on the evidence by the Court (TR P 2527 L 11-22). See *Marino v. United States,* (9th Cir., 1937) 91 F.2d 691 at p. 695, and the cases cited in footnote 11.

It is therefore respectfully submitted that the motion to sever was waived and that Defendant Semler was accorded a fair trial by an impartial jury and that there was not a mass trial in violation of defendant's constitutional rights and there was no error in the Court's instructions.

4. A MERE STATEMENT THAT THE COURT ERRED IN FAILING TO GRANT DEFENDANT SEM-

LER'S MOTION TO DISMISS THE INDICTMENT AND MOTION TO STRIKE DOES NOT RAISE THE ISSUE WITH NOTHING MORE ON THE RECORD, OR IN THE OPENING BRIEF.

These two motions were denied on December 10, 1962 (RC Item 10). They were not raised in Chambers just prior to the commencement of the trial (RC Item 13), they were not raised at the close of the Government's case (TR P 1624 L 21 to P 1634 L 20), except the statement on Lines 19-20, Page 1634 ("and in the alternative grant to Motion to Strike that we made."), which it is respectfully submitted may have had reference to the motion to strike Sergeant Howell's testimony (TR P 1413 L 19-25). The motions were not raised at the end of the evidence (TR P 2523 L 17-24) except the motion to strike, which it is submitted, was a reference to strike Howell's testimony (TR P 1413 L 19-25).

Should the Court contend the two issues have been raised, it is submitted that the Motion to Dismiss and the Motion to Strike were properly denied. *Williams v. United States,* (5th Cir., 1954) 208 F.2d 447, certiorari denied, 347 U.S. 928, 98 L.Ed. 1081, 74 S.Ct. 531, upholds a similar indictment, (see also *Frohwerk v. United States,* (1919) 249 U.S. 204 at p. 209; also *Braverman v. United States,* (1942) 317 U.S. 49, at p. 54), and the basis for the Motion to Strike "including" as surplusage and the overt acts as surplusage is still not clear now, as it was not clear when the motion to strike was made. The Court has wide discretion in determining what is subject to a motion to strike. (*United States v. Courtney,* (2nd Cir., 1958), 257 F.2d 944).

It is respectfully submitted that Defendant Semler has

not properly raised the Motion to Dismiss the Indictment or the Motion to Strike and further, that the Motions were properly denied.

VI.

CONCLUSION

There was sufficient evidence to sustain a conviction of Defendant Semler on the conspiracy count, Count I, and the substantive counts, Counts V, VII and X. The Court properly sustained the invoking of the privilege of the Fifth Amendment by Edsel Dekalb Howell on the question submitted on cross-examination which could incriminate him and which was on a subject not gone into on direct testimony and was not material or relevant to the issues in that a prior bad act of a witness, not a party, cannot be used to impeach the witness. The Appellant, Defendant Semler, was afforded a fair trial by an impartial jury. The Motion to Dismiss the Indictment and Motion to Strike have not been raised properly, and, if they were, were properly denied.

Respectfully submitted,

C. A. MUECKE
United States Attorney
For the District of Arizona

JOHN E. LINDBERG
Assistant United States Attorney

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney
Attorney for Appellee

Three copies of within Brief of Appellee mailed this 30 day of November, 1963, to:

DAVID M. RICHMAN
301 East Olive Avenue
Burbank, California 91502
Attorney for Appellant